

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
JusticePART 60

E-FILE

Peter Lampack Agency, Inc.,INDEX NO. 603525/2009

Plaintiff,

MOTION DATE _____

- v -

Martha Grimes, et al.,MOTION SEQ. NO. 001

Defendant(s).

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

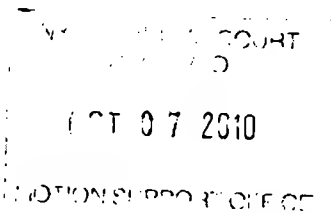
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that

✓
This motion is decided in accordance with the accompanying memorandum decision.
SO ORDERED

Dated: 10/6/2010

HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X
PETER LAMPACK AGENCY, INC.,

Plaintiff,

-against-

Index No. 603525/09

MARTHA GRIMES,

-and-

PENGUIN GROUP (USA) INC., PENGUIN PUTNAM INC.,
VIKING PENGUIN, a division of PENGUIN GROUP (USA)
INC., SIGNET a division of PENGUIN GROUP (USA) INC.,
ONYX, a division of PENGUIN GROUP (USA) INC., and
NEW AMERICAN LIBRARY, a division of PENGUIN
GROUP (USA) INC.,

Defendants.

-----X

APPEARANCES:

For Plaintiffs:

Stephen H. Palitz, Esq.
Bierman & Palitz LLP
74 Trinity Place, Suite 1550
New York, NY 10006

For Defendant Martha Grimes:

David B. Wolf, Esq.
Cowan DeBaets Abrahams & Sheppard LLP
41 Madison Avenue, 34th Floor
New York, NY 10010

For All Other Defendants:

Jonathan M. Herman, Esq.
Dorsey & Whitney LLP
250 Park Avenue
New York, NY 10177

001

FRIED, J:

This case involves the Peter Lampack Agency, Inc. (“PLA”), and Martha Grimes (“Grimes”), Penguin Group (USA) Inc. (“Penguin”), Penguin Putnam Inc. (“Penguin-Putnam”), Viking Penguin, a division of Penguin Group (USA) Inc. (“Viking-Penguin”), Signet, a division of Penguin Group (USA) Inc. (“Signet”), Onyx, a division of Penguin Group (USA) Inc. (“Onyx”), and New American Library, a division of Penguin Group (USA) Inc. (“New American”).

It is undisputed that in or about 1996, Grimes, an author of literary and commercial fiction, retained PLA as her literary agent. (Verified Complaint ¶ 10). PLA acted in this capacity for twelve years, during which it procured publishing agreements for numerous works authored by Grimes. (*Id.* ¶ 11). Those works were published and Grimes received over twelve million dollars from the publication and domestic and international sale of her novels. (*Id.* ¶¶ 12, 13). In or about May 2007, Grimes notified PLA that she would no longer be using PLA as her literary agent and retained a new representative. (*Id.* ¶ 17).

On November 18, 2009, PLA filed a complaint against all defendants alleging breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and seeking a declaratory judgment and injunctive relief. Pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7), Grimes moves to dismiss the first, second through seventh, eleventh, and fourteenth causes of action, which are detailed below.

On a motion to dismiss made pursuant to CPLR 3211, the complaint “is to be afforded a liberal construction,” and the plaintiff is afforded the “benefit of every possible favorable inference.” (*Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]). While a plaintiff’s

allegations are presumed true on a motion to dismiss, conclusory allegations “consisting of bare legal conclusions” are insufficient to survive a motion to dismiss. (*See Caniglia v. Chicago Tribune-New York News Syndicate Inc.*, 204 A.D.2d 233, 233 [1st Dep’t 1994]). When a motion is based on documentary evidence, pursuant to CPLR 3211(a)(1), dismissal of a cause of action is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Id.* at 88.). Under CPLR 3211(a)(7), “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Id.*, citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

The first cause of action alleges that Grimes breached the four book publishing agreement entered into by Grimes, Penguin, and Viking-Penguin in 2005 (“2005 Penguin/Viking-Penguin Agreement”). (*Id.* ¶ 39). The 2005 Penguin/Viking-Penguin Agreement contains an option clause providing:

[T]he Author hereby grants to the Publisher the exclusive right and option to publish . . . her next book-length work of fiction The Publisher shall have a period of thirty (30) days after receipt by the Publisher of the notification from the Author or her agent of the Author’s desire to commence negotiation concerning such next book-length work of fiction within which to notify the Author whether it desires to publish such work and to negotiate the terms and conditions of such publication.

(Affirmation of Ellis B. Levine, Exhibit B). On February 4, 2009, in accordance with the terms of the Option on Next Work clause, Grimes’ counsel sent a letter to Penguin enclosing a manuscript of “The Black Cat.” (*Id.*, Exhibit C). On February 27, 2009, Penguin made an oral proposal to Grimes’ counsel and the agreement for “The Black Cat” was finalized on

August 20, 2009. (*Id.*, Exhibits D and E). PLA alleges the publishing agreement for “The Black Cat” arose out of the Option on Next Work clause and that Grimes violated the terms of the 2005 Penguin/Viking-Penguin Agreement by refusing to account to PLA and refusing to pay PLA the sums due for “The Black Cat.” (Verified Complaint, ¶ 38, 39). PLA also alleges that the defendants acted in bad faith and breached the covenant of good faith and fair dealing implied in the 2005 Penguin/Viking-Penguin Agreement. (*Id.* ¶ 40).¹

The second through seventh causes of action allege breach of contract of multiple publishing agreements that PLA procured on behalf of Grimes. PLA alleges that Grimes entered into extensions of each of these publishing agreements and that as a result of these extensions, the publishers have paid Grimes and the successor agent substantial sums of money. (*Id.* ¶¶ 49, 62, 74, 86, 98, 110). PLA alleges that Grimes violated the terms of the underlying publishing agreements procured by PLA by refusing to account to PLA and refusing to pay PLA the sums due for the extensions of these agreements. (*Id.* ¶¶ 52, 64, 76, 88, 100, 112). PLA also alleges that the defendants acted in bad faith and breached the covenant of good faith and fair dealing implied in these publishing agreements. (*Id.* ¶¶ 53,

¹ A breach of the implied covenant of good faith and fair dealing is included in the first through seventh causes of action for breach of contract. However, “New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.” (*Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 81 [2d Cir. 2002]; *accord Canstar v. J.A. Jones Const. Co.*, 212 A.D.2d 452, 453 [1st Dep’t 1995]; *Levi v. Utica First Ins. Co.*, 12 A.D.3d 256, 257-58 [1st Dep’t 2004]). Here, the plaintiff’s claims for breach of the implied covenant of good faith and fair dealing are based on the same facts as the breach of contract claims. Since these causes of action are duplicative, the plaintiff’s causes of action for breach of the implied covenant are dismissed.

65, 77, 89, 101, 113).²

The eleventh and fourteenth causes of action allege breach of fiduciary duty. PLA alleges that the publishing agreements denoted in the first through seventh causes of action and the Foreign Rights Agreement denoted in the eighth cause of action created “a fiduciary relationship between Grimes and each of the respective Penguin defendants on the one hand and PLA on the other hand.” (*Id.* ¶¶ 135, 149). PLA alleges that Grimes and the Penguin defendants have breached their fiduciary duties to PLA under the agreements. (*Id.* ¶¶ 139, 152). PLA alleges that the defendants’ conduct has been “wanton, outrageous and malicious,” thus entitling PLA to an award of punitive damages. (*Id.* ¶¶ 141, 154).

The issues presented in this motion are whether PLA has sufficiently pleaded: (1) the first cause of action to establish that the terms of the 2005 Penguin/Viking-Penguin Agreement entitle PLA to commission for publishing agreements arising out of the Option on Next Work clause; (2) the second through seventh causes of action to establish that the terms of the publishing agreements mentioned in these causes of action entitle PLA to commission on extensions of those agreements; (3) the eleventh and fourteenth causes of action to establish that Grimes owes PLA a fiduciary duty.

I. First Cause of Action

In the first cause of action, PLA alleges that the publishing agreement for Grimes’ book “The Black Cat” arose out of the Option on Next Work clause in the 2005 Penguin/Viking-Penguin Agreement and that Grimes violated the terms of the 2005

2

See supra note 1.

Penguin/Viking-Penguin Agreement by refusing to pay PLA commission for “The Black Cat.” Defendant Grimes moves to dismiss the first cause of action, arguing that under the 2005 Penguin/Viking-Penguin Agreement, PLA is not entitled to commission for “The Black Cat” because: (1) PLA’s agency is not coupled with an interest and PLA’s agency was revoked in May 2007; (2) the Option on Next Work clause is an unenforceable “agreement to agree”; and (3) the publishing agreement for “The Black Cat” does not arise out of the Option on Next Work clause.

Turning to the arguments set forth in the Motion to Dismiss, the first issue is whether the terms of the 2005 Penguin/Viking-Penguin Agreement entitle PLA to receive commission for “The Black Cat.” Grimes argues that the terms of the 2005 Penguin/Viking-Penguin Agreement do not entitle PLA to commission for “The Black Cat” because PLA’s agency was not coupled with an interest and it was revoked before negotiations for the “The Black Cat” publishing agreement began. PLA argues that even if its agency was revoked, the first cause of action for breach of contract is sufficiently pleaded in the complaint because the publishing agreement for “The Black Cat” arose out of the Option on Next Work clause in the 2005 Penguin/Viking-Penguin Agreement and under the terms of that Agreement, PLA is entitled to commission for publishing agreements arising out of the Option on Next Work clause. (Plaintiff’s Memorandum of Law in Opposition to Defendant Grimes’ Motion to Dismiss, pp. 25-26; *see also* Affidavit of Peter Lampack, ¶¶ 29-30).

The only part of the 2005 Penguin/Viking-Penguin Agreement that entitles PLA to commission is the commission provision. The Option on Next Work clause does not provide for PLA to receive commission for publishing agreements arising out of the clause.

Therefore, in order to determine whether PLA has sufficiently pleaded a breach of contract claim for the first cause of action, I must look to the commission provision in the 2005 Penguin/Viking-Penguin Agreement and determine whether this provision entitles PLA to receive commission for publishing agreements arising out of the Option on Next Work clause. The commission provision in the 2005 Penguin/Viking-Penguin Agreement provides in relevant part:

The Author hereby appoints [PLA] irrevocably as the Agent in all matters pertaining to or arising from this Agreement Such Agent is hereby fully empowered to act on behalf of the Author in all matters in any way arising out of this Agreement All sums of money due the Author under this Agreement shall be paid to and in the name of said Agent The Author does also irrevocably assign and transfer to [PLA], as an agency coupled with an interest, and [PLA] shall retain a sum equal to fifteen percent (15%) of all gross monies due and payable to the account of the Author under this Agreement.

(Affirmation of Ellis B. Levine, Exhibit B).

It is the general rule that an agency for no definite term is revocable at will. (*Douglas Real Estate Mgmt. Corp. v. Montgomery Ward & Co.*, 4 N.Y.2d 33 [1958]; *Prod. Products Co. v. Vision Corp.*, 270 A.D.2d 922 [4th Dep't 2000]; *Conrad v. Golden*, 275 A.D. 946 [2d Dep't 1949]). However, when an agency authority is coupled with an interest, the agency is irrevocable. (*Hunts v. Rousmanier's Adm'rs*, 21 U.S. 174 [1823]; *In re Jarmakowski's Estate*, 8 N.Y.S.2d 35 [N.Y. Sur. 1938]; *Ravallo v. Refridgerated Holdings, Inc.*, 2009 WL 612490 [S.D.N.Y. 2009]). An agency is coupled with an interest where, as a part of the arrangement with the principal, the agent receives title to all or part of the subject matter of the agency. (3 Am. Jur. 2d Agency § 63; *In re Jarmakowski's Estate*, 8 N.Y.S.2d at 38;

Marbury v. Barnet, 40 N.Y.S. 76, 77 [1st Dep’t 1896] [“[t]o make the power irrevocable, there must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority”). Words alone are not enough to establish an agency coupled with an interest. (2A N.Y. Jur. 2d, Agency § 56; *In re Jarmakowski’s Estate*, 8 N.Y.S.2d at 38).

In this case, the commission provision grants PLA a 15% commission in the proceeds from its sale of rights in Grimes’ literary works and not an interest in those literary works themselves. The mere fact that the commission provision “appoints PLA irrevocably” as an agent is not enough to create an agency coupled with an interest. (*In re Jarmakowski’s Estate*, 8 N.Y.S.2d at 38 [“there must be more than mere words to establish an agency coupled with an interest”]). PLA argues that its agency is irrevocable because the agency authority was given as security for the debts incurred by PLA in procuring the publishing agreements for Grimes. However, an agent who is authorized to reimburse himself out of the proceeds of the agency for advances made or expenses incurred does not have a power coupled with an interest unless he is also given a property interest in the subject matter of the power. (3 Am. Jur. 2d Agency § 65). Since PLA does not have a property interest in Grimes’ literary works, its agency is revocable and it was revoked in May 2007. Therefore, PLA’s argument fails in so far as PLA relies on its alleged irrevocable agency to support its claim for breach of contract in the first cause of action.

The remainder of the commission provision in the 2005 Penguin/Viking-Penguin Agreement provides that “[PLA] shall retain a sum equal to fifteen percent (15%) of all gross monies due and payable to the account of the Author under this Agreement.” (Affirmation

of Ellis B. Levine, Exhibit B). The commission provision does not provide that PLA is entitled to commission on agreements arising out of the Option on Next Work clause and it only entitles PLA to commission for the four books that are the subject of the 2005 Penguin/Viking-Penguin Agreement. Therefore, PLA is not entitled to commission for “The Black Cat” and the first cause of action is dismissed. In light of this disposition, it is unnecessary to address Grimes’ other arguments with respect to the first cause of action.

II. Second Through Seventh Causes of Action

The second through seventh causes of action allege breach of contract for the following publishing agreements: (1) an agreement made in 2000 between Grimes, Penguin, and Putnam; (2) an agreement made in 1999 between Grimes, Putnam, and New American; (3) an agreement made in 2001 between Grimes, Putnam, and Signet; (4) an agreement made in 2002 between Grimes, Penguin-Putnam, and Penguin; (5) an agreement made in 2003 between Grimes, Penguin, and Signet; and (6) an agreement made in 2003 between Grimes, Penguin, and Signet.

PLA alleges that the agreements Grimes entered into with Penguin after she terminated PLA as her literary agent are “extensions” of the agreements that PLA procured on behalf of Grimes and that Grimes violated the terms of the underlying agreements by refusing to pay commission to PLA for the extensions. Defendant Grimes moves to dismiss the second through seventh causes of action, arguing that PLA is not entitled to commission for the extensions because PLA’s agency is not coupled with an interest and PLA’s agency was revoked in May 2007. PLA responds by arguing that whether or not its agency was revoked does not affect the sufficiency of the pleadings in the second through seventh causes

of action for breach of contract.

The only provision of the underlying publishing agreements that entitles PLA to commission is the commission provision. Since the commission provision in the underlying publishing agreements only grants PLA a 15% commission in the proceeds from its sale of right in Grimes' literary works, and not an interest in those literary works themselves, PLA's agency is revocable and it was revoked in May 2007. (*See infra*, Section I).

The remainder of the commission provision in the underlying publishing agreements only entitles PLA to commission for the literary works that are the subject of those agreements and it does not entitle PLA to commission for extensions of these agreements. Furthermore, PLA does not allege any facts or cite any cases to support its argument that despite the unambiguous terms of the commission provision in the underlying agreements, PLA is entitled to commission for extensions of these agreements. (*See Swits v. New York Sys. Exch.*, 281 A.D.2d 833, 835 [3d Dep't 2001] [holding that former salesperson is not entitled to commission on post-termination lease renewals or extensions because there was no express provision for the payment of commission post-termination]; *McGimpsey v. J. Robert Folchetti & Assoc., LLC*, 19 A.D.3d 658, 659 [2d Dep't 2005]; *Prod. Products Co. v. Vision Corp.*, 270 A.D.2d 922 [4th Dep't, 2000]). Therefore, the second through seventh causes of action for breach of contract are dismissed.

III. Eleventh and Fourteenth Causes of Action

In the eleventh and fourteenth causes of action, PLA alleges that the agreements it procured on behalf of Grimes "created a fiduciary relationship between Grimes and each of the respective Penguin defendants on the one hand and PLA on the other hand." (Verified

Complaint ¶¶ 135, 149). To support its claim that Grimes owes PLA a fiduciary duty, PLA alleges that over a 12 year period, PLA “diligently performed services as a literary agent for Grimes” and that as a result of these services, Grimes was paid a substantial sum of money. (*Id.* ¶¶ 11, 13). The complaint further alleges that “[PLA] placed its trust in Grimes and the [defendants] to use their superior knowledge with respect to the financial affairs of the licensing agreements and the value of PLA’s interests, and to faithfully handle the funds due PLA under the agreements that Grimes and [defendants] are entrusted with and to account to [PLA] for all funds held or distributed under the agreements. (*Id.* ¶¶ 137, 150).

PLA further alleges that Grimes and the other defendants breached their fiduciary duties to PLA under the agreements, thereby causing PLA injury, harm, and damages. (*Id.* ¶¶ 139, 152). PLA seeks punitive damages for the alleged breach of fiduciary duty. (*Id.* ¶¶ 141, 154). In response, Grimes argues that PLA’s breach of fiduciary duty claims should be dismissed because PLA has not alleged any facts to support its assertion that Grimes owes PLA a fiduciary duty.

Generally, while “the agent owes a fiduciary obligation to the principal . . . the obligations that a principal owes an agent . . . are not fiduciary.” Restatement (Third) of Agency § 1.01, cmt. e (2006); 2A NY Jur. 2d, Agency § 259 (“in the ordinary situation, there is no trust and confidence reposed by the agent in the principal, as there is by the principal in the agent”). As stated by the Court of Appeals:

A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally presents in the marketplace between those

involved in arms' length business transactions. Generally, where parties have entered into a contract, courts look to that agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency. If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them.

(*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19-20 [2005] [internal citations and quotation marks omitted]).

In *EBC I*, the court found that the pleadings were sufficient to establish Goldman's fiduciary duty to the plaintiff where the complaint essentially alleged that the plaintiff hired Goldman to give it advice for the benefit of plaintiff's company and that the plaintiff relied on Goldman's expertise to advise it as to a fair price and engage in honest dealings with the plaintiff's best interest in mind. (*Id.* at 20). By contrast, where the plaintiff's complaint merely recites that the defendant owes the plaintiff a fiduciary duty and the agreement between the parties sets forth the details of that relationship, courts have found that the plaintiff was unable to plead a special relationship to support its fiduciary duty claim. (See *L. Magarian & Co., Inc. v. Timberland Co.*, 245 A.D.2d 69, 69-70 [1st Dep't 1997]; *Rakus, Inc. v. 3 Red G, LLC*, 26 Misc. 3d 1206(A), 2010 WL 26252 at *3 [N.Y. Sup. 2010]).

Under the terms of the publishing agreements procured by PLA, PLA was appointed as Grimes' literary agent and, as the author, Grimes was the principal in the relationship. PLA's allegation that Grimes, the author, owes a fiduciary duty to her literary agent, is unsupported by case law and the general principles of agency law that the obligations that a principal owes an agent are not fiduciary. (Restatement [Third] of Agency § 1.01, cmt. e [2006]).

Furthermore, unlike *EBC I*, PLA's allegations that the parties worked together for an extended period of time and generated a lot of money are not sufficient to support its claim that Grimes owes PLA a fiduciary duty. PLA's allegation that it "placed its trust in Grimes . . . to use [her] superior knowledge [of] the financial affairs of the licensing agreements" runs contrary to the tenor of the parties' publishing agreement which appointed PLA as Grimes' literary agent. Finally, PLA's right to commission under the publishing agreements creates a contractual, not a fiduciary, obligation which requires both parties to act fairly and adhere to the implied covenant of good faith and fair dealing. Therefore, PLA's allegations are insufficient to support its claim that Grimes owes PLA a fiduciary duty and the eleventh and fourteenth causes of action are dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss the first, second through seventh, eleventh and fourteenth causes of action is granted; and it is further

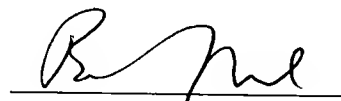
ORDERED that the parties appear for a status conference in court on October 28, 2010 at 2:30 p.m.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated:

10/6/2010

ENTER:



J.S.C.

HON. BERNARD J. FRIED